dogs, "[h]e was instructed to stay where he was." Had the Officers followed their usual practice, they would have allowed the caretaker and the owner to control the dogs. The Officers' only explanation for not doing so -- "maintain[ing] the element of surprise" – is utterly specious when one considers the noise made by a rifle shot.

2. Using The Pepper Spray The Officers Carry

San Jose Officers were quick to point out that there are other non-lethal means of dealing with belligerent dogs as well, including the use of pepper spray. Officer Nieves, who shot the Vieiras' dogs, admitted that he had pepper spray with him on January 21, 1998. He provided no explanation for not using it.

3. Chasing The Dog Away Or Into An Enclosure

San Jose Officers also testified that they have dealt with dogs they encountered in the past by shouting at them or chasing them away, or into some enclosure. No explanation was offered as to why this non-lethal option was not planned for or utilized in this case.

4. Utilizing An Animal Control Officer

Finally, Officers pointed out that one of the non-lethal options available to them is to call upon a humane officer or someone else trained to immobilize dogs. Officer Decena testified that the Officers did not think of doing so in this case until after the dogs were killed.

ARGUMENT

Petitioners do not contend that the Ninth Circuit's decision conflicts with a decision from another Circuit. Nor do they contend that the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Rather, Petitioners assert that the Ninth Circuit misapplied a properly stated rule of the law. Specifically, Petitioners argue that the Ninth Circuit relied on an impermissibly broad and general statement of "clearly established" law, a prong of the qualified immunity analysis. In fact, it is Petitioners who seek to draw distinctions between this case and firmly established precedent that are far too fine. A reasonable officer in Linderman's and the San Jose Officers' positions would have known that his conduct violated Respondents' Fourth Amendment rights.

I. Sergeant Linderman Violated Respondents' Clearly Established Fourth Amendment Rights

A. The Scope of the Warrants

Long before January 20-21, 1998, when Linderman obtained the warrants and directed the searches at issue here, it was understood that the Fourth Amendment proscribes searches and seizures that exceed a warrant's scope. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 17-19 (1968) ("This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope.") (citing *Kremen v. United States*, 353 U.S. 346 (1957); *United States v. Di Re*, 332 U.S. 581, 586-87 (1948); *Go-Bart Importing Co. v. United States*,

282 U.S. 344, 356-58 (1931)); *United States v. Tamura*, 694 F.2d 591, 594 (9th Cir. 1982); *United States v. Penn*, 647 F.2d 876, 882 n.7 (9th Cir. 1990); *VonderAhe v. Howland*, 508 F.2d 364, 369-70 (9th Cir. 1975).

"In determining whether or not a search is confined to its lawful scope, it is proper to consider both the purpose disclosed in the application for a warrant's issuance and the manner of its execution." *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1979); *see also Terry*, 392 U.S. at 19 ("The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."); *VonderAhe*, 508 F.2d at 369 ("What is 'overly broad' cannot be resolved in an abstract or academic manner but only in relation to the facts, circumstances under, and the purpose for, which the warrants were issued."). The reviewing court must also scrutinize the particular purpose of a search when considering whether it was necessary to damage property during the search's execution. *Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997) ("[B]ecause the touchstone of the constitutionality of an officer's conduct during a search is reasonableness, when executing a search warrant, an officer is limited to conduct that is reasonably necessary to effectuate the warrant's purpose."); *Ayeni v. Mottola*, 35 F.3d 680, 689 (2d Cir. 1994) ("Among the issues that must be resolved at trial are not only the extent of physical force and intrusive measures employed during the search, but whether such measures were justified by the purposes of the search."), *abrogated on other grounds by Wilson v. Layne*, 526 U.S. 603 (1999); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 804 (1994) ("Greater intrusiveness requires greater justification.").

Sergeant Linderman sought "any evidence of membership in [sic] affiliation with, activity of, or identity of, any gang, including but not limited to, any reference to 'Hells Angels'" to prove the sentencing enhancement codified in California Penal Code section 186.22, which was alleged against a third party. California Penal Code section 186.22(b) provides that a defendant is eligible for a three-year sentence enhancement when the prosecution proves that the defendant committed the crime of conviction "for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members." Cal. Pen. Code § 186.22(b). Section 186.22(b)(1) specifies that the provision has three separate elements: (1) the existence of a "criminal street gang"; (2) a conviction for a felony committed for the benefit of, at the direction of, or in association with that gang; and (3) that the crime of conviction was committed with the specific intent to promote, further, or assist in criminal conduct by gang members.

Proof of the first element, the existence of a "criminal street gang," itself requires proof of three separate elements: (1) an ongoing organization, association or group of three or more persons, whether formal or informal, which has a common name or common identifying sign or symbol; (2) having as one of its "primary activities" the commission of one or more of the predicate offenses specified in section 186.22(e); and (3) whose members individually or collectively engage in a "pattern of criminal gang activity." Cal. Pen. Code § 186.22(f); *see also People v. Louen*, 17 Cal. 4th 1, 18 (1997). In its Order of July 13, 2001, the district court rejected Plaintiffs' challenge to the legality of the searches for Hells Angels indicia, finding that Defendants had probable cause to search because such evidence would have helped to make out the first of the three elements of the "criminal street gang" sentencing enhancement, that the

Hells Angels is an ongoing organization of three or more which has a common name or common identifying sign or symbol. (Plaintiffs/Respondents have reserved their right to appeal this order.)

To prove this first element of the sentencing enhancement, one need only look at the substantial admissible evidence in the public domain, including Respondents' website and United States Patent & Trademark Office filings. In Mr. Tausan's case, the prosecution proved it by calling San Jose Police Officer Jorge Gil Blanco as an "expert" on the Hells Angels. Officer Gil Blanco, who had been surveilling San Jose Charter members and their associates for more than eight years without ever making an arrest, showed the jury generic pictures of Hells Angels and public displays of their trademarked name to establish that the group has a common name, identifying sign or symbol. None of the property seized from Respondents was used to prove anything at all.

B. The Inadequacy Of Linderman's Case For Exceeding the Scope of the Warrants

Petitioner Linderman avoids discussing the necessity for seizing "truckloads" of Respondents' property, instead arguing that he was "commanded" to do so by the language of the warrant. This is nonsense.

The warrants call for "any" Hells Angels indicia to prove California Penal Code section "186.22". Identical language is used in Linderman's Affidavit in support of the warrants. Linderman admitted at his deposition that he knew the reference was to section 186.22(b), the sentencing enhancement, which had been charged against a third party. He knew that the evidence was relevant merely to prove that

the Hells Angels is an ongoing organization of three or more having a common name or common identifying sign or symbol.

The first definition of "any" in Merriam Webster's Collegiate Dictionary is "one or some indiscriminately of whatever kind." This is consistent with the way in which a reasonable officer in Sergeant Linderman's position would have interpreted the term, particularly when he learned how much "indicia" there was, and that Respondents' property would be damaged and/or destroyed if the officers were to seize it all. *See Andersen v. Maryland*, 427 U.S. 463, 480 (1976)(law enforcement officers must read ambiguous phrases in warrants to only authorize the search for and seizure of evidence related to the purpose for which the warrant was obtained).

Linderman, in contrast, chose to act unreasonably, and now asks the Court to find that he had no choice because the *third* definition of "any" in Merriam Webster's is "all." While this argument might work for a search team member who had not read the affidavit in support of the warrants and did not know the limited purpose for which the evidence was sought, it does not work for Linderman. Linderman did not just read the affidavit, *he wrote it. See Groh v. Ramirez*, 540 U.S. 551, 561-564 (2004) (officer who wrote the warrant affidavit and warrant forms could not escape liability by blaming the authorizing magistrate). He knew the limited purpose for which the evidence was sought. In directing the searchers to go beyond what was necessary to fulfill this purpose, he violated Respondents' Fourth Amendment rights.

Dissenting Judge Bea argues that the majority "minimizes the importance of the searches." Linderman's

App. 34 n.1. Judge Bea points out that the warrants refer to "felonies" and California "Penal Code 186.22," without specifying the subsection. *Id.* Subsection 186.22(a) makes it a felony to actively participate in a criminal street gang. Subsection 186.22(b) is the sentencing enhancement. But all this is beside the point. Linderman knew that the evidence was pertinent only to the sentencing enhancement. His affidavit in support of the warrants did not even attempt to establish probable cause as to the crime. The Complaint filed against Steve Tausan prior to the searches alleged the sentencing enhancement and not the crime. Linderman confirmed that he was going for the "enhancement" and not the crime during his sworn deposition. Thus, while it might be theoretically possible for an officer to believe, based on the warrant, that he was searching for evidence of a crime, Linderman could not have and did not believe this.

Respondents heartily agree with Judge Bea that the warrants might be overbroad. But that hardly absolves Linderman, who was responsible for drafting, obtaining and serving them. He had actual knowledge of the limited purpose for which the evidence was sought, actual knowledge that the officers conducting the searches had found more than enough, and he nevertheless gave the order: "Take everything."

Linderman's attempt to twist the Fourth Amendment's particularity requirement into a mandate that officers act more intrusively than necessary is wholly unpersuasive. The purpose of the particularity requirement is to prevent general searches and to "assure[] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Groh v. Ramirez*, 540 U.S. at 561. Neither of these purposes would be served by requiring officers to seize everything conceivably included within a warrant's coverage, even when it is unnecessary

to fulfill the purpose for which the evidence was sought. To impose such a requirement would be to create a "new rule," not the reverse. As the Ninth Circuit had found in a case decided 12 years before Linderman issued the order to "take everything" in this case, "[t]he fact that the officers did not seize all of the materials permitted by the warrant does not mean that they possessed the type of unfettered discretion that violates the fourth amendment." *United States v. Hayes*, 794 F.2d 1348, 1356 (9th Cir. 1986), *cert. denied*, *Hayes v. U.S.*, 479 U.S. 1086 (1987).

Finally, it is Linderman and not the Ninth Circuit whose interpretation of the law is "unworkable" in practice. No reasonable officer would believe that a trial judge would permit the prosecution to introduce into evidence 115 patches, 65 wall plaques, a Pepsi machine, a refrigerator, a Bud Lite pool table light, a safe, a cash register, a display case with a Death's Head sticker on it, a mail box, a street sign, nine cardboard boxes full of t-shirts, a door, posters, road signs, paintings, magazines and a concrete slab – and that's just what was seized from the clubhouse – plus a dozen Harley Davidson motorcycles and scores of items similar to those listed above that were seized from Respondents' homes. The Ninth Circuit has not created a "new rule" requiring officers to make nuanced tactical distinctions best left to an attorney, as Linderman argues. Linderman has been held accountable for failing to apply the judgment and common sense that the Fourth Amendment requires any reasonable officer entrusted with executing a search warrant to apply.

Linderman's motion for summary judgment based on qualified immunity was properly denied.

II. Officers Decena, Newman, Manion, Knox, Carney, Messier, and Nieves Violated Respondents' Clearly Established Fourth Amendment Rights

It was well established at the time the Officers shot Respondents' dogs that the shooting of a dog by a police officer is a seizure for Fourth Amendment purposes and is thus subject to the "reasonableness" test. The Officers had a week to plan the execution of the search warrants in this case. San Jose had a policy and practice of avoiding shooting dogs if at all possible, and these officers had managed to avoid shooting dogs in other cases. Yet they made no realistic plan other than to shoot Respondents' dogs. Their conduct was, as Judge Bea aptly put it, "outrageous." "Clearly, a reasonable officer [in these Officers' position] would have understood that his actions violated an established right of the plaintiffs." The Officers' App. 31 (Bea, concurring).

The Officers' effort to distinguish the numerous cases confirming this principle by arguing that none of them involved the shooting of a dog *while executing a warrant* is specious. If anything, the cases, which involved the shooting of dogs encountered by officers while on patrol or on an emergency call, highlight the unreasonableness of the Officers' conduct in this case. There were no exigent circumstances here. These officers were not faced with a split second decision. They had *a week* to plan for their encounter with the dogs. If officers responding on a moment's notice are required to act reasonably, these Officers certainly were.

The Officers' motion for summary judgment based on qualified immunity was properly denied.

CONCLUSION

The lower courts acted properly in denying Petitioners' motions for summary judgment based on qualified immunity. Petitioners' conduct was unreasonable and it would have been clear to an officer in these officers' positions that it was unreasonable. This Court should deny Linderman's and the San Jose Officers' Petitions for Writs of Certiorari.

Respectfully submitted,

KAREN L. SNELL*
Attorney at Law
102 Buena Vista Terrace
San Francisco, CA 94117
(415) 225-7592

NANCI L. CLARENCE
CLARENCE & DYER LLP
899 Ellis Street
San Francisco, CA 94109
(415) 749-1800

Attorneys for Respondents

* *Counsel of Record*